88-1075

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASSOCIATED BUILDERS AND CONTRACTORS, INC., and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,
Petitioners,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the unprecedented, court-ordered curtailment of statutorily mandated notice and comment procedures, in connection with the promulgation of the revised Hazard Communication Standard by the Occupational Safety and Health Administration (OSHA), has violated Section 6 of the Occupational Safety and Health Act and Section 553 of the Administrative Procedure Act, and has created a conflict within the circuits.

2. Whether the Court of Appeals' failure to require OSHA to find that the provisions of the revised Standard are reasonably necessary and appropriate to reduce a significant risk of harm to workers in the construction industry creates a conflict within the circuits and conflicts with Section 3(8) of the OSH Act and with decisions of this Court.

3. Whether the Court of Appeals' failure to require OSHA to demonstrate that the revised Standard is feasible, in the unique circumstances of the construction industry, conflicts with Section 6 of the OSH Act and decisions of this Court and creates a conflict within the circuits.

4. Whether the Court of Appeals' interference with the Office of Management and Budget's lawful disapproval of burdensome information collection requirements contained in the revised Standard, creates a conflict within the circuits and violates the Paperwork Reduction Act, 44 U.S.C. § 3501.

LIST OF PARTIES

The present petitioners Associated Builders and Contractors, Inc. (ABC) and the Construction Industry Trade Associations (CITA)* were parties to two related decisions of the United States Court of Appeals for the Third Circuit from which certiorari is being sought in this single petition.

In *Associated Builders and Contractors v. Brock*, C.A. Nos. 88-3345, 88-3346, 88-3347, 88-3348 (Nov. 25, 1988), ABC was a petitioner and CITA an intervenor. Other parties below were co-petitioners Associated General Contractors of America and the Associated General Contractors of Virginia, United Technologies Corporation, and National Grain and Feed Association, Inc. and Intervenors National Paint and Coatings Association, Building and Construction Trades Dept., AFL-CIO, Public Citizen, Inc. and the Connecticut Council on Occupational Safety and Health.

In *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988), *reh. den.* (Nov. 28, 1988), ABC and CITA were both intervenors. Petitioners in that case were United Steelworkers of America, Public Citizen, Inc., and the states of New York, Illinois and Massachusetts. AGC, UTC and NGFA also intervened.

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* Petitioner CITA consists of a coalition of the following construction industry trade associations, representing over 200,000 member employers, who intervened in both cases: The National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall & Ceiling Industries-International, Insulation Contractors Association of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheetmetal and Air Conditioning Contractors National Association.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
I. The Unprecedented, Court-Ordered Curtailment Of Statutorily Mandated Notice And Comment Procedures, In Connection With OSHA's Promulgation Of The Revised Hazard Communication Standard, Has Violated Section 6 Of The Occupational Safety And Health Act And Section 553 Of The Administrative Procedure Act And Has Created A Conflict Within The Circuits	11
II. The Decision Of The Court Below Is Directly In Conflict With Decisions Of This Court and of Other Circuit Courts Holding That OSHA Is Required by Section 3(8) of the Act To Make A Finding That The Provisions Of A New Safety Standard Are Reasonably Necessary And Appropriate To Reduce A Significant Risk Of Harm To Employees In The Affected Industry	14

TABLE OF CONTENTS—Continued

Page

III. The Court of Appeals' Decision To Require OSHA Merely To Show That the Revised HCS Was Not *Infeasible*, Directly Conflicts With Decisions Of This Court and Other Circuit Courts Requiring OSHA To Find That Any New Safety Standard Is Feasible Based Upon Substantial Evidence In The Record As A Whole.... 16

IV. The Court of Appeals' Decision Conflicts Directly With The Paperwork Reduction Act And With A Decision In The D.C. Circuit In That It Interferes With OMB's Lawful Disapproval Of Burdensome Information Collection Requirements 18

CONCLUSION 20

APPENDIX A-1a

TABLE OF AUTHORITIES

Cases Page

Action Alliance of Senior Citizens v. Bowen, 846 F.2d 1449 (D.C. Cir. 1988) 18
American Federation of Labor v. Donovan, 757 F.2d 330 (D.C. Cir. 1985) 11, 13
American Textile Manuf. Inst. v. Donovan, 452 U.S. 490 (1981) 14, 16
Associated Builders and Contractors, Inc. v. Brock, C.A. Nos. 88-3345, 88-3346, 88-3347, 88-3348 (Nov. 25, 1988) ..... *passim*
Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984) 19
Chamber of Commerce of United States v. OSHA, 636 F.2d 464 (D.C. Cir. 1980) 11, 13
Ethyl Corp. v. E.P.A., 541 F.2d 1 (D.C. Cir. 1976) 11, 13
Fire Equipment Mfrs. Ass'n v. Marshall, 679 F.2d 679 (7th Cir. 1982), *cert. den.*, 459 U.S. 1105 (1983) 6
Forging Industry Ass'n v. Secretary of Labor, 773 F.2d 1436 (4th Cir. 1985) 17
Industrial Union Dept. AFL-CIO v. American Petro. Inst., 448 U.S. 607 (1980) 14, 15, 16
Public Citizen Health Research Group, Inc. v. Tyson, 786 F.2d 1479 (D.C. Cir. 1986) 15
Texas Independent Growers Ass'n v. Marshall, 630 F.2d 398 (5th Cir. 1980) 15
United Steelworkers of America v. Auchter (USWA I), 763 F.2d 728 (3d Cir. 1985) 1, 5, 12
United Steelworkers of America v. Marshall, 647 F.2d 1189 (D.C. Cir. 1979), *cert. den.*, 453 U.S. 913 (1981) 7, 15, 17
United Steelworkers of America v. Pendergrass (USWA II), 819 F.2d 1263 (3d Cir. 1987) 1, 5, 17
United Steelworkers of America v. Pendergrass (USWA III), 855 F.2d 108 (3d Cir. 1988) ..... *passim*
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) 13

TABLE OF AUTHORITIES—Continued

Statutes	Page
Administrative Procedure Act, 5 U.S.C. § 553	11
Construction safety Act, 40 U.S.C. § 333	6
Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*	2
29 U.S.C. § 652(8)	2, 14, 16
29 U.S.C. § 655(b)	2, 11
Paperwork Reduction act, 44 U.S.C. § 3501 *et seq.*	
44 U.S.C. § 3502	3
44 U.S.C. § 3504	3, 6, 19
44 U.S.C. § 3518	19
Federal Rules and Other Notices	
29 C.F.R. 1926.21	15
47 Fed. Reg. 12101 (Mar. 19, 1982)	5, 12, 13
52 Fed. Reg. 31852 (Aug. 24, 1987)	7, 12
53 Fed. Reg. 20960 (June 7, 1988)	18
H. Rep. No. 96-835, 96th Cong., 2d Sess. (Mar. 19, 1980)	19
S. Rep. No. 96-930, 90th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. and Admin. News 6241	19
132 Cong. Rec. S16741 (Oct. 16, 1986)	19

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OPINIONS BELOW

Certiorari is being sought in connection with two related cases recently decided by the United States Court of Appeals for the Third Circuit. The decision of the Court of Appeals in *Associated Builders and Contractors, Inc. et al., v. Brock*, dated November 25, 1988, is not yet reported. (A-1). The decision of the same court in *United Steelworkers of America v. Pendergrass (USWA III)*, dated August 19, 1988, is reported at 855 F.2d 108. (A-24a). The Court's denial of rehearing *en banc* in the latter case dated November 28, 1988 has not been reported. (A-38a). Previous decisions of the same court in the same matter *(USWA I* and *USWA II)* are reported at 763 F.2d 728, and 819 F.2d 1263, respectively.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered related judgments in this case on November 25, 1988 and November 28, 1988. Jurisdiction to hear this case is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The following provisions are pertinent to this case:

Section 3(8) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 652(8) provides:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

Section 6(b)(2) of the Act, 29 U.S.C. § 655(b)(2) provides:

> The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

Section 6(b)(5) of the Act, 29 U.S.C. § 655(b)(5) provides:

> The Secretary, in promulgating standards dealing with toxic material or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the

basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

The Paperwork Reduction Act, 44 U.S.C. § 3502 provides:

> (4) The term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reports or recordkeeping requirements, or other similar methods calling for either—
>
> (A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
>
> (B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes;
>
> * * * *
>
> (11) the term "information collection request" means a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information;

Section 3504(c) provides:

> (c) The information collection request clearance and other paperwork control functions of the Director shall include—
>
> (1) reviewing and approving information collection requests proposed by agencies;
>
> (2) determining whether the collection of information by an agency is necessary for the

proper performance of the functions of the agency, including whether the information will be of practical utility for the agency;

STATEMENT OF THE CASE

This petition for writ of certiorari seeks plenary review of the Third Circuit's decisions in *Associated Builders and Contractors v. Brock*, Nos. 88-3345, 88-3346, 88-3347, 88-3348 (Nov. 25, 1988) and *United Steelworkers of America v. Pendergrass (USWA III)*, 855 F.2d 108 (3rd Cir. 1988). In *Associated Builders and Contractors v. Brock* (A-1a), the Third Circuit denied petitions for review of the Occupational Safety and Health Administration's (OSHA's) revised Hazard Communication Standard, as applied to all non-manufacturing industries, and vacated a stay of the Standard earlier granted by a panel of that court with regard to the construction industry. In *USWA II* (A-24a), the Third Circuit further held that the federal Office of Management and Budget ("OMB") had incorrectly disapproved portions of OSHA's revised HCS under the Paperwork Reduction Act and purported to deny a motion for stay pending judicial review.

The revised Hazard Communication Standard, issued in August 1987, requires all employees to provide their employees with information concerning chemicals in the workplace. The standard mandates, *inter alia*, that all employers develop written hazard communication programs for each of their workplaces, that containers of hazardous chemicals in the workplace be labeled, that a Material Safety Data Sheet (MSDS) on each hazardous chemical be maintained at each workplace, and that employees receive hazard training at the inception of their job assignment and whenever a new hazard is introduced.

The revised HCS was issued without regard to statutorily mandated rulemaking procedures, pursuant to an extraordinary series of orders by the Court of Appeals

for the Third Circuit. As a result of the Third Circuit's orders and OSHA's attempt to comply therewith, millions of employers have been deprived of any meaningful opportunity to comment on the revised HCS, and a new Standard has been promulgated which imposes tremendous burdens on small businesses without any improvement in workplace safety.

The original Hazard Communication Standard, issued by OSHA in 1983, covered only the manufacturing sector of the economy and was tailored for the manufacturing workplace. OSHA intended to use the original standard as a prototype to determine whether a hazard communication standard would be beneficial in other industries, and intended to determine later what form those standards should take. 47 Fed. Reg. 12101-02 (March 19, 1982).[1]

In *United Steelworkers of America v. Auchter*, 736 F.2d 728 (3d Cir. 1985) *(USWA I)*, the Court of Appeals ordered OSHA either to reconsider whether the standard should apply to non-manufacturing industries, or to explain to the court why such application would not be feasible. As OSHA was preparing to conduct rulemaking to evaluate whether to extend the standard to other industries, however, the court again intervened in order to expedite the process. The court ordered OSHA to issue a non-manufacturing standard within 60 days, without further rulemaking, or to explain as to each category of excluded workers why such a standard would be "infeasible." *United Steelworkers of America*

[1] In proposing the manufacturing standard, OSHA invited comments on the "appropriateness of the industry scope selected" but flatly stated that "non-manufacturing employers are not covered by the proposal." 47 Fed. Reg. at 12101-02. OSHA further stated it intended to evaluate the effectiveness of the manufacturing standard before determining "at a later date" whether to extend or modify a hazard communication standard for other non-manufacturing industries like construction. *Id.*

v. Pendergrass, 819 F.2d 1263, 1270 (3rd Cir. 1987) *(USWA II)*.

None of the affected non-manufacturing industries were represented before the Court of Appeals in either of its proceedings.[2] The court was not asked to consider whether OSHA had found a hazard communication standard to be reasonably necessary and appropriate to reduce significant risks in the construction industry, or other non-manufacturing industries, as required by Section 3(8) of the Act. Nor did the court address how OSHA should comply with its other statutory rulemaking responsibilities within the assigned 60-day period, such as those dictated by the Construction Safety Act or the Paperwork Reduction Act.[3]

OSHA itself resisted the court's order, pointing out in a petition for rehearing that compliance with the order would likely violate the Act. OSHA's Petition for Rehearing stated in part that, "the record developed for the HCS did not reflect conditions in non-manufacturing industries because it focused on existing practices and desirable implementation methods in manufacturing industries." *Id.* at 8. OSHA further asserted that the court had "erred in a fundamental way by ordering promulgation of a standard whose limited evidentiary underpinnings create a substantial risk of invalidation in the

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[2] Insofar as the non-manufacturing sector was not adversely affected by OSHA's original manufacturing-only HCS, its representatives had no right to petition a court for review of that Standard. *See Fire Equipment Mfrs. Ass'n v. Marshall*, 679 F.2d 679 (7th Cir. 1982) *cert. den.*, 459 U.S. 1105 (1983).

[3] Under the Construction Safety Act, 40 U.S.C. § 333 and OSHA's own regulations, OSHA is required to submit all proposed construction standards to the Advisory Committee on Construction Safety and Health prior to publication. Under the Paperwork Reduction Act, 44 U.S.C. § 3504(h)(1), OSHA is required to submit all proposed information collection requirements to the Office of Management and Budget (OMB) for its approval, prior to publication.

event of subsequent attack." *Id.* at 10. After the court denied OSHA's rehearing petition, however, OSHA chose to extend the manufacturing standard, with some significant revisions, to non-manufacturing industries, with an effective date of May 23, 1988. 52 Fed. Reg. 31852 (August 24, 1987).

The construction industry and others petitioned for review of the revised Standard in several different circuits. The petitioners asserted that, since OSHA had never published a proposed standard applicable to non-manufacturing employers prior to issuing the final revised HCS, as required by Section 6 of the Act, such employers had been unlawfully deprived of the opportunity to comment on the revised standard prior to its publication. Also, the petitioners noted that OSHA had failed to find that the revised standard was reasonably necessary and appropriate to reduce any significant risks in the construction industry, contrary to Section 3(8) of the Act. Finally, the Petitioners argued that OSHA had failed to address the unique characteristics of the construction workplace which make it infeasible to impose a standard designed for implementation in a manufacturing workplace.[4]

Meanwhile, on October 28, 1987, pursuant to its authority under the Paperwork Reduction Act, 44 U.S.C. § 3501, the Office of Management and Budget (OMB) independently disapproved three provisions of the revised Standard. *See* 52 Fed. Reg. 46075 (Dec. 4, 1987). These provisions included (1) the requirement that employers exchange material safety data sheets at multi-employer work sites; (2) an exemption from the requirements of the Standard limited to consumer products used in the

[4] The construction industry has previously been recognized by both OSHA and the courts as requiring unique regulatory treatment due to the unique circumstances of the construction industry workplace. *See United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1310 (D.C. Cir. 1980).

same manner and quantities as intended for consumer use; and (3) an exemption for drugs limited to those in tablet or pill form regulated by the Food and Drug Administration.

The revised Standard was scheduled to go into effect, except for the provisions disapproved by OMB, on May 23, 1988. However, on May 20, 1988, the United States Court of Appeals for the District of Columbia Circuit stayed enforcement of the Standard pursuant to a Motion filed by Petitioners ABC and CITA, while at the same time the court transferred the case to the Court of Appeals for the Third Circuit. On June 24, 1988, a panel of the Third Circuit further stayed the revised Standard, at least with regard to its effects on the construction industry, pending the outcome of the court's ultimate ruling on the merits of the Standard.

Subsequently, pursuant to a Motion for Further Relief filed by the original petitioners in *USWA I and II*, the Court of Appeals in *USWA III* held that the regulations disapproved by OMB did not involve the "collection of information" within the meaning of the Paperwork Reduction Act. (A-24a). The court ordered that the provisions disapproved by OMB should be enforced as "logical outgrowths" of the rulemaking record previously reviewed by the court. The court also purported to deny ABC's Motion for Stay of the Revised Standard, though that Motion had already been ruled on by another panel of the Third Circuit and was no longer before the court. (A-36a). Following the court's order, both the Department of Justice and United Technologies Corporation filed Petitions for Rehearing *en banc*, which were denied by the Court of Appeals on November 28, 1988.

Finally, the Court of Appeals received briefs and heard oral argument on the Petitions for Review filed by ABC and other parties, which challenged enforcement of the revised Hazard Communication Standard. The Court of

Appeals denied the Petitions for Review on November 25, 1988. The court held that notices published by OSHA concerning the possible scope of the original manufacturing Hazard Communication Standard were sufficient to alert all employers of the opportunity to submit comments as to coverage of their industry. (A-11a). The court did not address Petitioners' contention that Section 6 of the Occupational Safety and Health Act further required publication of a proposed rule applicable to their industries prior to promulgation of a final Standard.

With regard to the required "significant risk" finding, the court held that the agency had made such a finding, applicable to all workers who would be exposed to hazardous chemicals, in connection with the promulgation of the original, manufacturing hazard communication standard. (A-12a). The court further held, without citation of authority, that for what it characterized as a "performance-oriented information disclosure Standard", "the significant risk requirement must of necessity be satisfied by a general finding concerning all potentially covered industries." (A-13a). The court did not address Petitioners' further contention that, regardless of whether significant risk had been found to exist, OSHA had failed to find that the provisions of the revised Hazard Communication Standard were reasonably necessary and appropriate to reduce such alleged risks in the construction industry, as required by Section 3(8) of the Act.

Finally, with regard to the feasibility issue, the Court of Appeals found only that OSHA had "concluded that the [original manufacturing rulemaking record] contained no credible evidence that the Standard would be technologically or economically infeasible for any industrial sector." (A-14a). The court made no finding that the revised Hazard Communication Standard was in fact feasible, based upon substantial evidence in the record as a whole.

REASONS FOR GRANTING THE WRIT

This case involves the promulgation by OSHA of a safety standard imposing new regulatory burdens on every non-manufacturing employer in the United States, including hundreds of thousands of small employers in the construction industry, without in any way increasing workplace safety. The issues presented are of extraordinary importance not only because of the unnecessary burdens which the new standard will unlawfully impose, but also because of the Court of Appeals' unprecedented abrogation of statutorily mandated administrative procedures prior to promulgation of the Standard and its usurpation of the proper authority of OSHA and OMB. The court's holdings threaten the rights of all interested parties to participate fairly in administrative rulemakings and to be protected against burdensome and infeasible regulations.

The decision of the Court below squarely conflicts with numerous decisions of this Court and other circuits and with the plain language of several statutory provisions governing OSHA's rulemaking process. It is therefore imperative that the Court accept review in order to reestablish the validity of its own holdings and to reaffirm what had been thought to be settled administrative procedures. Absent the Court's intervention, the precedent set by this case will deprive interested parties generally of the opportunity to comment on proposed rules and will result in the promulgation of unnecessary and infeasible OSHA standards that fail to increase workplace safety. Thus, as is further elaborated below, the Court should accept review in order to redress clear violations of the rights of numerous employers presently affected by the revised HCS and to prevent unwarranted disruption of statutorily mandated administrative procedures.

I. The Unprecedented, Court-Ordered Curtailment Of Statutorily Mandated Notice And Comment Procedures, In Connection With OSHA's Promulgation Of The Revised Hazard Communication Standard, Has Violated Section 6 Of The Occupational Safety And Health Act And Section 553 Of The Administrative Procedure Act And Has Created A Conflict Within The Circuits.

The Occupational Safety and Health Act of 1970 provides the Secretary of Labor with the authority to promulgate occupational safety and health standards. The Act sets forth the procedure for promulgation of standards at 29 U.S.C. § 655(b). Section 655(b)(2) provides in pertinent part that

> The Secretary shall *publish a proposed rule* promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. (Emphasis added).

The Administrative Procedure Act, 5 U.S.C. § 553(b) also requires that notice of a proposed rule be published. Under that Act, the Court of Appeals of the District of Columbia Circuit has held that notice "should be sufficiently descriptive of the 'subjects and issues involved' so that interested parties may offer informed criticisms and comments." *Ethyl Corp. v. E.P.A.*, 541 F.2d 1, 48 (D.C. Cir. 1976). *See also Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980); *American Federation of Labor v. Donovan*, 757 F.2d 330, 337-340 (D.C. Cir. 1985).

In the present case, pursuant to the orders of the Court of Appeals, OSHA never published a proposed rule on hazard communication for non-manufacturing employers prior to issuing the revised Standard in final form. Issuance of the non-manufacturing standard thus violated the plain language of OSHA's governing statute.

The only proposed hazard communication standard ever published was one which was expressly limited to manufacturing industries. As OSHA itself stated in the preamble to that rulemaking: "non-manufacturing employers are not covered by this proposal." 47 Fed. Reg. at 12101-02. Following the Court of Appeals' initial ruling in *USWA I*, OSHA issued an Advance Notice of Proposed Rulemaking on November 25, 1985, 50 Fed. Reg. 48794, which merely posed a series of questions as to how an expanded hazard communication standard might work in non-manufacturing industries. The ANPR did not contain a proposed non-manufacturing standard, however, and OSHA did not subsequently issue a proposed rule for non-manufacturers as required by statute and its own regulations, because the Court of Appeals did not allow time for it, prior to publication of the final HCS. In addition, the final non-manufacturing HCS contained significant provisions nowhere mentioned in the manufacturing HCS, including the special treatment of multi-employer worksites. *See* 52 Fed. Reg. 31860-31867.

By issuing a final rule without first issuing a proposed rule applicable to non-manufacturers, OSHA deprived interested parties of their right to comment on specific proposals applicable to them. The Court of Appeals misunderstood and failed properly to address this critical issue. The court's sole discussion of the notice and comment problem consists of its assertion that non-manufacturing employers somehow were placed on notice that they should file comments concerning the original manufacturing standard. (A-11a). However, the alleged opportunity of non-manufacturing employers to comment on a standard applicable solely to manufacturers does nothing to satisfy the statutory requirement that employers have a chance to comment on a proposed rule applicable to *themselves*.

In any event, the court below was also wrong in finding that non-manufacturers were placed on notice that

they should comment on the substance of the manufacturing HCS. OSHA repeatedly made clear its position that the Standard would not apply beyond the manufacturing sector. *See* 47 Fed. Reg. 12101-02. The agency's references to possible expansion of the standard to the non-manufacturing sector never stated or implied that such a drastic event would occur without prior notice of a specific, proposed rule. Thus, the Court of Appeals' holding was clearly erroneous and is in direct conflict with numerous cases in other circuits dealing with notice and comment procedures. *See Chamber of Commerce of United States v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980); *American Federation of Labor v. Donovan*, 757 F.2d 330, 337-40 (D.C. Cir. 1985); *Ethyl Corp. v. EPA*, 514 F.2d 1, 48 (D.C. Cir. 1976).[5]

It is beyond the resources of industry groups to comment on every rule which OSHA proposes, no matter how attenuated its effects on their interests. The Court of Appeals' decision would compel parties to file comments on every proposed standard, however, for fear that they will otherwise waive their right to comment when the standard is applied to them at a later date. Moreover, OSHA could easily circumvent statutory notice and comment procedures under the lower court's holding merely by routinely requesting comments on the possible scope of all proposed standards.

Such a result will lead to the filing of time consuming "protective" comments by unaffected parties in every OSHA proceeding, thereby weighing down the agency with unnecessary paper and further taxing its already strained

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[5] The actions of the court below also conflicted with this Court's holding in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 550 (1978), in which the Court expressly prohibited the courts of appeals from "straying beyond the judicial province to explore the procedural format or to impose on the agency [their] own notion of which procedures are 'best' or most likely to further some vague, undefined public good."

resources. Alternatively, future interested parties, like the present petitioners, will find themselves subjected to a burdensome and perhaps needless standard without having any meaningful opportunity to comment thereon, because of an inadequate OSHA rulemaking record. Neither result is contemplated by the statute. Therefore, the Court of Appeals' decision must be reversed by this Court in order to prevent the statute's plain language from being violated.

II. The Decision Of The Court Below Is Directly In Conflict With Decisions Of This Court And Of Other Circuit Courts Holding That OSHA Is Required By Section 3(8) Of The Act To Make A Finding That The Provisions Of A New Safety Standard Are Reasonably Necessary And Appropriate To Reduce A Significant Risk Of Harm To Employees In The Affected Industry.

Under previously settled law, OSHA cannot impose new and burdensome standards without first finding, based on substantial evidence in the record, that each provision of the new standard is "reasonably necessary and appropriate" to reduce a "significant" risk to employees. *See* Section 3(8) of the Act, 29 U.S.C. § 652(8). In *American Textile Manuf. Inst. v. Donovan*, 452 U.S. 490, 536-40 (1981), this Court struck down a portion of OSHA's cotton dust standard because OSHA failed to show that each *specific* provision contributed to increased safety in the textile industry. Similarly, in *Industrial Union Dept. AFL-CIO v. American Petro. Inst.*, 448 U.S. 607 (1980), a plurality of this Court invalidated OSHA's benzene standard because of the agency's inadequate explanation as to how the rule would reduce or eliminate a significant risk to employees.

In the present instance, the Third Circuit held without citation to authority that because the HCS is a

> performance-oriented information disclosure standard covering thousands of chemical substances used

> in numerous industries . . . the significant risk requirement must of necessity be satisfied by a *general finding* concerning all potentially covered industries

(A-13a). (Emphasis added). This holding clearly contradicts Supreme Court precedent. It also conflicts directly with the decision of the Court of Appeals for the Fifth Circuit in *Texas Independent Growers Ass'n v. Marshall*, 630 F.2d 398 (5th Cir. 1980). There, the Fifth Circuit partially struck down OSHA's cotton dust standard because the agency improperly relied on risk data concerning cotton dust's effects in manufacturing industries when it extended the standard to the entirely separate ginning industry. In *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1309-10 (D.C. Cir. 1980), on the other hand, the Court of Appeals for the D.C. Circuit upheld the construction industry's exemption from OSHA's lead exposure standard due to the unique work practices and lower degree of exposures among construction's transient, open-air workforce.

The court below also created a direct conflict between the circuits and with the statute by focusing exclusively on the question of whether a "significant risk" had been shown, without making any determination that the standard is "reasonably necessary and appropriate" to reduce that risk. *See Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1485 (D.C. Cir. 1986). Construction industry employers, unlike other industries, are already required by OSHA to provide hazard communication training to their employees. 29 C.F.R. 1926.21. There has been no showing that the additional burdens imposed by the revised HCS will reduce any alleged risk of harm among construction employees. Thus, on this ground as well, the Court of Appeals' decision was plainly wrong and must be reversed.[6]

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[6] Again, the court addressed the existing training requirements solely in the context of whether a significant risk existed. The court failed to address how the new provisions of the HCS con-

No authority exists to create a distinction between a "performance-oriented," informational standard as opposed to any other type of standards. A plurality of this Court has held that Section 3(8) of the Act requires OSHA to find that *all* standards are reasonably necessary and appropriate to reduce significant risk. *Industrial Union Dept. AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 639 (1980). Therefore, the Court should grant certiorari in order to review the lower court's apparent, blatant departure from the Court's prior holdings and to resolve the conflict in the circuits on this issue.

III. The Court Of Appeals' Decision To Require OSHA Merely To Show That The Revised HCS Was Not *Infeasible*, Directly Conflicts With Decisions Of This Court And Other Circuit Courts Requiring OSHA To Find That Any New Safety Standard Is Feasible Based Upon Substantial Evidence In The Record As A Whole.

The Third Circuit has further erred in shifting OSHA's burden of proving the technological and economic feasibility of the proposed standards for each industry to one in which petitioners must prove *in*feasibility in order to void the standard. The court found that because OSHA had established that employee training and maintenance of labels and material safety data sheets is feasible in the manufacturing sector it need not do so for the non-manufacturing sector. (A-14a).

The holding of the court below fails to take into account the unique circumstances of the construction industry and conflicts sharply with this Court's decision in *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981). The Court there squarely held that OSHA's standards can only be upheld if they are shown to be

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tributed anything over and above the existing requirement to increased worker safety, and the record contains no evidence whatsoever of risk reduction resulting from the revised HCS in the construction industry.

feasible, based upon substantial evidence in the record as a whole. The Court of Appeals' decision also conflicts directly with the D.C. Circuit's decision in *United Steelworkers of America v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 913 (1981) and the Fourth Circuit's decision in *Forging Industry Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1452 (4th Cir. 1985) (en banc). In these decisions, the courts held that the feasibility of an OSHA standard must be proved by the agency for each affected industry.

In the present case, the record was totally inadequate for OSHA to make findings of feasibility in the construction industry, as OSHA itself admitted in its petition for rehearing following *USWA II*. Construction employers, unlike manufacturers, are frequently confronted with transient and mobile workforces, multiple worksites at remote locations, nonexistent administrative facilities and small profit margins with which to absorb the high costs imposed by the revised Standard.[7] None of these factors have been taken into account, either by OSHA or the court below.

Thus, Supreme Court intervention is necessary to resolve an important conflict in the circuits as to the burden OSHA must sustain in establishing the feasibility of standards which affect numerous and different sectors of the economy. Resolution of this issue is particularly important insomuch as OSHA is now developing a "generic" standard applicable to the entire economy, ad-

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[7] The most recent estimates of the likely costs of compliance with the revised HCS, for a typical construction contractor employing 10 employees, are that the company will have to spend an additional $15,000 in the first year alone, followed by substantial additional costs in subsequent years. Based on the average net profits of typical construction employers, it has further been estimated that compliance with the revised HCS as written will wipe out the profits of a substantial percentage of industry employers. See Comments filed with OSHA by the Construction Industry Hazard Communication Coalition, Docket No. H-022D, Oct. 28, 1988.

dressing exposure limits for several hundred toxic substances. *See* 53 Fed. Reg. 20960 (June 7, 1988).

IV. The Court Of Appeals' Decision Conflicts Directly With The Paperwork Reduction Act And With A Decision In The D.C. Circuit In That It Interferes With OMB's Lawful Disapproval Of Burdensome Information Collection Requirements.

As noted above, certiorari is also being sought herein with regard to the Court of Appeals' decision in *USWA III*, because in that decision the Third Circuit has utterly misconstrued the scope and purpose of the Paperwork Reduction Act.

OMB's disapproval of part of the revised HCS, in and of itself, lends credence to petitioners' claims that the standard was defective and unlawful. The court's arbitrary attempt to invalidate OMB's disapproval removes an important safeguard against regulatory abuse and must not be permitted by this Court, and creates a conflict among the circuits.

The language of the Paperwork Reduction Act applies to the collection of all information required by a federal agency for any regulatory purpose. This interpretation has been upheld previously in *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988). In that case, the D.C. Circuit rejected the argument that the Act applied only to documents required to be furnished to an agency, noting that Congress was not "concerned solely or primarily with private parties' costs of *mailing* data to Washington, it is the record-keeping and data-gathering that constitute the burden." 846 F.2d at 1453. The Third Circuit's decision conflicts with that of the D.C. Circuit and effectively eviscerates the Act, leaving employers with no protection from burdensome and unnecessary paperwork regulations.

Contrary to the effect of the Third Circuit's decision, nothing in the Act exempts federally-sponsored informa-

tion disclosures from coverage. The legislative history of the Act emphasizes a specific congressional intent to cover such disclosures as well. *See* H.Rep. No. 96-835, 96th Cong., 2d Sess. at 23 (March 19, 1980); S.Rep. No. 96-930, 90th Cong., 2d Sess. at 39-40, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6241, 6279-80; 132 Cong. Rec. S16741 (Oct. 16, 1986). The Act grants the OMB independent authority over agency regulation to determine "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency." 44 U.S.C. §§ 3504(c)(2), 3518.

However, the Third Circuit construed Section 3518(e) to deny the Director the authority to determine whether a particular paperwork requirement is necessary or useful to accomplish a particular substantive policy. This erroneous interpretation removes the Director's authority under section 3504(c)(2) to review the "necessity" and "practical utility" of paperwork requirements. The only interpretation which preserves both the agency's substantive mission and the Act's purposes is that the agency makes the policy and OMB determines whether a proposed paperwork requirement is necessary or useful in achieving that policy. As the government itself has argued to the lower court, the Third Circuit's holding contradicts the plain language of the Act, creates a conflict within the circuits and further violates this Court's holding in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). The Supreme Court should accept review in order to resolve these conflicts and reinstate OMB's intended role in regulating the paperwork burden imposed by administrative agencies.

CONCLUSION

For these reasons, and upon the entire record herein, Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Date: December 28, 1988

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,
and
JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,
and
THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)

United Technologies Corporation, Associated General Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

Intervenors

No. 83-3346

THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Council on Occupational Safety and Health ("ConnCOSH"),

Intervenors

No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO,
Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF LABOR

Argued: September 16, 1988

Before: GIBBONS, *Chief Judge*, HUTCHINSON and SCIRICA, *Circuit Judges*

(Opinion Filed: November 25, 1988)

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OPINION OF THE COURT

GIBBONS, *Chief Judge*:

Before the court are four petitions for review of the revised hazard communication standard promulgation by the Secretary of Labor pursuant to Section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b) (OSH Act). The petitioners are the Associated Builders and Contractors, Inc. (ABC), the National Grain & Feed Association, Inc. (NGFA), the Associated General Contractors of Virginia, et al. (AGC), and United Technologies Corporation (UTC). These petitions were initially filed in the District of Columbia Circuit, the Second Circuit, and the Fourth Circuit. Since the filing in the District of Columbia Circuit was earliest, the other petitions were transferred and consolidated there. Thereafter, the Building and Construction Trades Department, AFL-CIO intervened, and on the motion of the intervenors the petitions were transferred to this court. The transfer order was made because the hazard review standard was before this court on three prior occasions. *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985) (*USWA I*); *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) (*USWA II*); *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) (*USWA III*). Because those prior decisions are controlling, we will deny the petition for review.

I.

In USWA I this court ordered the Occupational Safety and Health Administration (OSHA) to apply its recently promulgated hazard communication standard not only to the manufacturing sector, but to the non-manufacturing sector as well, unless the agency could "state reasons why such application would not be feasible." 763 F.2d

at 739. Except for a part of its treatment of trade secrets, the hazard communications standard was otherwise upheld. 763 F.2d at 743.

In *USWA II*, the petitioners in *USWA I* returned to the court seeking to enforce the judgment in that case. OSHA, following the *USWA I* judgment, had issued a notice of proposed rulemaking, claiming that the record was insufficient to determine the issue of feasibility of the standard outside the manufacturing sector. This court held that OSHA was not in compliance with the *USWA I* judgment, which did not contemplate notice and comment. It ordered OSHA to promulgate, within 60 days, a hazard communications standard applicable to all workers covered by the OSH Act, or state reasons separately, as to each category of excluded workers, why, on the basis of the present administrative record, a hazard communication standard is not feasible. 819 F.2d at 1270.

In *USWA III* the original petitioners moved for further relief in enforcement of the *USWA I* judgment. By then OSHA had on August 24, 1987, published an expanded hazard communication standard applicable to all industries. 52 Fed. Reg. 31852 et seq. (codified at 29 C.F.R. § 1910.1200). This revised standard was to go into effect on May 23, 1988. 29 C.F.R. § 1019.1200(j). On September 10, 1987, however, OSHA submitted it to the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB)). OMB, ostensibly in compliance with the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812, 44 U.S.C. § 3501 et seq. (Supp. 1988), sought public notice and comment "on the recordkeeping, notifications, and other paperwork requirements of the revised standard." 52 Fed. Reg. 36652. Following a public hearing OMB purported to disapprove three provisions which the revised standard adopted. These three new provisions were: (1) a requirement that at multi-employee worksites employers

exchange Material Safety Data Sheets obtained from chemical manufacturers, 29 C.F.R. § 1910.1200(e)(2); (2) an exemption from the labeling requirements of the standard for consumer products used in the same manner and quantities as intended for consumer use, 29 C.F.R. § 1900.1200(b)(6)(vii); and (3) an exemption from labeling of drugs in tablet or pill form regulated by the Federal Drug Administration. 29 C.F.R. § 1910.1200 (b)(6)(viii). This court held that the regulations disapproved by OMB did not involve the collection of information within the meaning of the Paperwork Reduction Act. 855 F.2d at 113. Summarizing the prior history of the case, we noted:

> In USWA I we directed OSHA to reconsider the application of the hazard communication standard to employees in sectors of the economy other than manufacturing unless the Secretary could state reasons why such application would not be feasible. 763 F.2d at 739 (citing 29 U.S.C. § 655(b)(5)). In USWA II we made it clear that our first judgment required that feasibility be determined for each category of worker on the basis of the administrative record already compiled. 819 F.2d at 1270. Thus, our prior orders represent our considered view that OSHA must cease abdicating its responsibility with respect to employees outside the manufacturing sector, by deciding whether or not they should be covered on the basis of the record. The August 24, 1987 promulgation of a hazard communication standard applicable to all employees was a good faith compliance with those orders. The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed. *Cf. Action Alliance*, at 1455 (new round of rulemaking not required for a revision that is the "logical outgrowth" of the rulemaking record). Withdrawal of the provisions disapproved by OMB was accordingly inconsistent with those orders. Re-

> lief by motion is appropriate. 28 U.S.C. § 1651(a) (1982); 5 U.S.C. § 706(1) (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977); *USWA II*, 819 F.2d at 1270.

855 F.2d at 113-14.

II

The present petitioners, unlike those who were the moving parties in *USWA I*, *II*, and *III*, seek to prevent enforcement of the hazard communication standard. Their objections include both procedural and substantive challenges to the promulgated standard.

A.

Sufficiency of Notice of Rulemaking

The four petitioners contend that OSHA violated section 6(b) of the OSH Act, 29 U.S.C. § 655(b), by failing to provide adequate notice of proposed rulemaking affecting their industries. That contention is foreclosed by *USWA II*, which exhaustively detailed the fact that the scope of industry coverage had been an important issue for public comment throughout the entire regulatory proceeding. The court wrote:

> On June 28, 1977 the Secretary published an advance notice of proposed rulemaking on hazardous materials labeling. *See* 42 Fed. Reg. 5,372 (1977). In that advance notice, the Secretary requested "public comment as to whether a standard requiring employers to label hazardous materials should be developed and what should be contained in such standard to assure that employees are apprised of the hazards to which they are exposed." *Id.* All "interested persons" were "invited to submit written data, views, and arguments concerning a standard on hazardous material labeling." *Id.* at 5,373. Among the topics on which comments were requested was "[s]upported cost data of the estimated costs of

> coming into compliance with the recommendations of the advisory committee." *Id.* At this stage in 1977, the notice, like the Advisory Committee Report's recommendation, was addressed to all employers, not only to employers in the manufacturing sector.

819 F.2d at 1265. In the same opinion, this court recognized that the 1982 notice was at least as explicit. That notice invited comment on the appropriateness of the industry scope to be selected, and whether or not industries outside the manufacturing sector should be included. *Id.* at 1266. Thus this court's holding that the Secretary provided adequate notice to all employers was clearly stated.

The four petitioners urge that since they were not parties to the initial petition for review, they are not bound by the prior panel decision. OSHA, on the other hand, contends that the discussion of the notice of rulemaking in *USWA II* is law of the case. We need not resolve that difference, however, because in any event the facts with respect to the 1981 and 1982 notices have not changed, and a prior panel has applied the law to those facts. Thus *USWA II* is a binding precedent of the court which this panel could not disregard even if it had a mind to do so. Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, 8C. Nor are we of such a mind. The notice was sufficient to alert all employers of the opportunity to submit comments as to coverage of their industry. Thus the petitioners' objections to the adequacy of notice of proposed rulemaking are rejected.

B.

The Significant Risk Finding

Several of the petitioners contend that the hazard communication standard is invalid because it was promulgated without a significant risk determination. Under

Sections 3(8) and 6(b)(5) of the OSH Act, 29 U.S.C. §§ 652(8), 655(b)(5), the Secretary must determine that there exists a significant risk of harm to employees and that a standard is reasonably necesary or appropriate to reduce that risk. *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 614-15, 639 (1980) (plurality opinion).

The agency record on this issue was reviewed by this court in USWA I. The court upheld OSHA's finding that a section 6(b)(5) standard is required to address a significant risk to workers. 763 F.2d at 735. The significant risk finding applied to all workers who would be exposed to hazardous chemicals. *Id.* at 738. Indeed, the court noted the incongrity of protecting spray painters, for example, in the manufacturing sector, but not in construction. *Id.* at 737.

The agency record on this issue was reviewed once again in *USWA II*. In that case we ordered OSHA, on remand, to consider solely the feasibility of the standard outside the manufacturing sector, not to reestablish its nened. 819 F.2d at 1270. As with the treatment of the notice issue in *USWA I* and *USWA II*, the record on the significant risk issue is unchanged, and this panel is not free to disregard the holdings in those prior opinions of the court.

Petitioners, ABC, AGC, and NGFA, contend that those opinions did not address their specific contention, that OSHA must make a significant risk determination separately for each industry: in this case, construction and grain processing or storage. We do not interpret the opinions so narrowly. The standard was approved for the manufacturing sector, which has twenty major Standard Classification (SIC) Code subdivisions. There is no more obvious need for industry specific significant risk determinations for the construction and grain industries than for subdivisions of the manufacturing sector. The

holdings in USWA I and USWA II sustained a general significant risk finding. Assuming, however, that those opinions were construed as leaving open the significant risk issue, as presently presented, the outcome would be no different. This rulemaking proceeding produced a performance-oriented information disclosure standard covering thousands of chemical substances used in numerous industries. For such a standard the significant risk requirement must of necessity be satisfied by a general finding concerning all potentially covered industries. A requirement that the Secretary assess risk to workers and need for disclosure with respect to each substance in each industry would effectively cripple OSHA's performance of the duty imposed on it by 29 U.S.C. § 655(b)(5); a duty to protect all employees, to the maximum extent feasible. We reject, as well, the contention by ABC and AGC that because the construction industry already provides training in hazardous materials handling, there is no significant risk in that industry. At best that argument establishes the existence of risks, and the requirement for maintenance on the jobsite of information on those risks can only make the existing training more effective. As to risks posed by grain dust, the propensity of grain elevators to blow up has been well documented.

C.

The Feasibility Determination

Several petitioners contend that the Secretary's feasibility determination, made after the remand in USWA II, is not supported by the rulemaking record. Unlike the notice of rulemaking and significant risk issues, the feasibility determination, outside the manufacturing sector, has not previously been addressed by this court. Our review of that determination asks whether "the Secretary carried out [her] essentially legislative task in a manner reasonable under the state of the record before [her.]" *Synthetic Organic Chemical Mfrs. Ass'n v. Bren-*

nan, 503 F.2d 1155, 1158 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975) (quoting *Florida Peach Growers Ass'n v. United States Dep't of Labor*, 489 F.2d 120, 129 (5th Cir. 1974)).

When OSHA adopts standards relating to activities on the frontiers of scientific knowledge, feasibility issues may be difficult. Here, however, the main components of the hazard communication standard, except for chemical manufacturers, are training of workers and the maintenance of labels and material safety data sheets furnished by chemical manufacturers. These obligations hardly approach the limits of feasibility. The Secretary had, prior to our remand in *USWA I*, already established that the employee training and the maintenance of labels and material safety data sheets is feasible in the manufacturing sector, encompassing a spectrum of SIC Code subdivisions with employers of all sizes. As this court's remand required, the Secretary examined the same rulemaking record, and concluded that it contained no credible evidence that the standard would be technologically or economically infeasible for any industrial sector. That conclusion is on the agency record completely supportable, and we are not permitted to substitute our legislative judgment for that of OSHA. If there are deficiencies in that record they may not be laid at OSHA's door, for as we hold in Part II A above, the affected employers received notice of the rulemaking proceedings.

D

The Unlawful Delegation Contention

One final substantive challenge to the hazard communication standard is advanced on behalf of NGFA, which contends that OSHA unlawfully delegated its rulemaking authority to the American Conference of Governmental Industrial Hygienists (ACGIH) when OSHA incorporated in the standard that organization's Threshold Limit Values for Chemical Substances and Physical

Agents in the Work Environment. ACGIH is an impartial scientific organization which identifies safe exposure levels for various substances.

This court in *USWA I* decided the delegation question when it held, over the objections of the Petitioner Public Citizens, and the State of New Jersey as *amicus*, that OSHA need not itself evaluate specific chemical hazards, but could rely on information developed by chemical manufacturers. 763 F.2d at 739. The reliance on ACGIH is an *a fortiori* case, and *USWA I* controls. Even if it did not control, we would in any event reject the unlawful delegation contention. It was appropriate to adopt ACGIH's list as a floor, while imposing on chemical manufacturers the requirement that they research and assess hazards independently. 20 C.F.R. § 1910.1200(d)(3). That action was fully consistent with section 6(b)(5) of the OSH Act, which directs OSHA to set toxic substance standards based on "the best available evidence" with due consideration to "the latest available scientific data."

III

None of the substantive or procedural challenges to the application of the hazard communication standard to the construction or grain processing and storage industries have merit. The petitions for review of ABC, AGC, and NGFA will therefore be denied. The stay of those standards granted by a panel of this court on June 24, 1988, shall be vacated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for
Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR,
Respondents

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United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,

Petitioner

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

ORDER AMENDING OPINION

The slip opinion in the above matter, filed November 25, 1988, is hereby amended as follows. The penultimate sentence of section III on page 16 should read: "The petition for review of ABC, AGC, NGFA, and UTC will therefore be denied."

/s/ John J. Gibbons
Chief Judge

Dated: December 5, 1988

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)

United Technologies Corporation, Associated General Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

Intervenors

No. 88-3346

THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Council on Occupational Safety and Health ("ConnCOSH"),

Intervenors

No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation,
United Steelworkers of America, AFL-CIO, CLC,
The National Grain and Feed Association, Inc.,
Building and Construction Trades Department,
AFL-CIO,

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner

v.

THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR,
Respondent

ON PETITION FOR REVIEW OF THE REVISED HAZARD COMMUNICATION STANDARD PROMULGATED BY THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

Present: GIBBONS, *Chief Judge*, HUTCHINSON and SCIRICA, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the Occupational Safety and Health Administration, United States Department of Labor and were argued by counsel September 16, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the petitions for review of the revised hazard communication standard promulgated by the said Administration and published at 52 Fed. Reg. 31852, et seq. (August 24, 1987), be, and the same are hereby denied. It is further ordered that the stay of the said standard granted by a panel of this Court on June 24, 1988 is vacated. Costs taxed against the petitioners. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

November 25, 1988

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 83-3554, 83-3561, 83-3565, 84-3066,
84-3093 and 84-3128

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

THE STATE OF NEW YORK, the STATE OF NEW JERSEY, the STATE OF CONNECTICUT and NATIONAL PAINT & COATINGS ASSOCIATION,
Intervenors.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

THE STATE OF NEW JERSEY, CHEMICAL MANUFACTURERS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE & ATLANTIC RICHFIELD COMPANY, and NATIONAL PAINT & COATINGS ASSOCIATION,
Intervenors.

PUBLIC CITIZEN, INC., *et al.*,
Petitioners,

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

THE STATE OF NEW JERSEY, CHEMICAL MANUFACTURERS ASSOCIATION, NATIONAL PAINT & COATINGS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE & ATLANTIC RICHFIELD COMPANY,
Intervenors.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, SECRETARY OF LABOR, UNITED SATES DEPARTMENT OF LABOR,
Respondent.

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR, and RAYMOND DONOVAN, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Submitted Under Third Circuit Rule 12(6)
Aug. 5, 1988

Decided Aug. 19, 1988

David C. Vladek, Public Citizen Litigation Group, Washington, D.C., for petitioner Public Citizen, Inc.

George H. Cohen, Michael H. Gottesman, John Rothchild, Bredhoff & Kaiser, Washington, D.C., Mary-Win O'Brien, United Steelworkers of America, Pittsburgh, Pa., Laurence Gold, Washington, D.C., for petitioner United Steelworkers of America, AFL-CIO-CLC.

John R. Bolton, Asst. Atty. Gen., Stephen C. Yohay, Ann Elizabeth Reesman, McGuiness & Williams, Washington, D.C., for intervenor Associated General Contractors of America.

George R. Salem, Sol. of Labor, Allen H. Feldman, Associate Sol. for Special Appellate and Supreme Court Litigation, Leonard Schaitman, Marleigh D. Dover, Attorneys, Appellate Staff, Civ. Div., Dept. of Justice, Washington, D.C., Steven J. Mandel, for Appellate Litigation.

Nathaniel I. Spiller, U.S. Dept. of Labor, Washington, D.C., Robert G. Damus, Acting Gen. Counsel, Steven D. Aitken, Office of Management and Budget, Washington, D.C., for respondent.

W. Scott Railton, Washington, D.C., for intervenor United Technologies Corp.

Before GIBBONS, Chief Judge, and FISHER,* and KELLY,** District Judges.

OPINION OF THE COURT

GIBBONS, Chief Judge.

I

Once again United Steelworkers of America and Public Citizen, Inc. *et al.*, (petitioners) come before this court on a motion seeking further relief in the enforcement of our judgment in *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir.1985) (USWA I), issued on May 24, 1985. In USWA I we directed the Secretary of Labor to reconsider the application of the hazard communication standard promulgated pursuant to section 6 of the Occupational Safety and Health Act of 1970 (OSH Act), Pub.L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (1982), to employees in sectors of the economy other than manufacturing. 763 F.2d at 743. The Secretary took the position that this judgment permitted the commencement of an entirely new rulemaking proceeding. The petitioners, contending that the Secretary was not in good faith complying with our judgment, moved for further relief. In *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir.1987) (USWA II) we held that by commencing a new rulemaking proceeding the Secretary was not complying with our previous judgment. We directed that the Secretary should,

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* Hon. Clarkson S. Fisher, United States District Court Judge for the District of New Jersey, sitting by designation.

** Hon. James M. Kelly, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

> within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered by the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible. Such statement of reasons will be supplied separately as to each category of excluded workers.

819 F.2d at 1270. (Footnote omitted). On August 7, 1987 this court denied the Secretary's petition for rehearing and motion for a stay.

On August 24, 1987 the Occupational Safety and Health Administration (OSHA or the Secretary) published an expanded hazard communication standard applicable to all industries. 52 Fed.Reg. 31852, *et seq.* (codified at 29 C.F.R. § 1910.1200). This August 24, 1987 promulgation includes an OSHA finding that the rulemaking record on the whole supported a determination that the hazard communication standard is feasible in all industries. 52 Fed.Reg. at 31857. It applies the hazard communication standard to employers in all economic sectors, including the labeling requirements, as well as the requirement that covered employers make available for employee inspection Material Safety Data Sheets (MSDS) furnished by the manufacturers of hazardous chemicals used in the workplace, and the requirement that employees be provided with information and training on hazardous chemicals used in their work area. The August 24, 1987 promulgation also includes three provisions not contained in the original hazard communication standard applicable in the manufacturing sector alone. These are: (1) a requirement that at multi-employer worksites employers exchange their MSDSs, either individually or through a central location, 29 U.S.C. § 1910.1200(e)(2); (2) an exemption from the labeling

requirement for consumer products used in the same manner and quantities as intended for consumer use, 29 C.F.R. § 1910.1200(b)(6)(vii); and (3) an exemption from labeling of drugs in tablet or pill form regulated by the Federal Drug Administration. 29 C.F.R. § 1910.1200 (b)(6)(viii). OSHA explained that these modifications were made "to ensure that [the] provisions [of the standard] are practical and effective in communicating hazards to all workers" and in recognition of "the unique characteristics of some businesses [that] render certain provisions of the [previous] standard unnecessary or ineffective in communicating the hazards of chemicals to workers." 52 Fed. Reg. at 31858.

This revised hazard communication standard was to go into effect on May 23, 1988. 29 C.F.R. § 1910.1200(j). On September 10, 1987, however, OSHA submitted it to the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB), ostensibly in compliance with the Paperwork Reduction Act of 1980, Pub.L. 96-511, 94 Stat. 2812, 44 U.S.C. § 3501 *et seq.* (Supp.1988). On September 30, 1987, OMB undertook public notice and comment "on the recordkeeping, notification and other paperwork requirements" of the revised standard. 52 Fed.Reg. 36652. Following a public hearing, OMB purported to disapprove the three new provisions referred to in the preceding paragraph. OMB also conditioned its approval of the entire standard on the undertaking by OSHA of further rulemaking to consider OMB's objections. OMB letter of October 23, 1987. Further negotiations between OSHA and OMB followed, and on April 13, 1988 OMB announced that it would permit the revised standard, but without the "disapproved" portions, to go into effect on May 23, 1988 as scheduled.

Meanwhile, two court proceedings regarding the revised standard were initiated. First, Associated Builders & Contractors, Inc. petitioner to review the revised hazard communication standard in the United States Court

of Appeals for the District of Columbia, and moved for a stay of its enforcement in the construction industry. *Associated Builders & Contractors, Inc. v. McLaughlin*, (D.C.Cir. No. 87-1582). This court, on motion of the petitioners, transferred the Associated Builders & Contractors, Inc. petition to this court, but granted an administrative stay "until such time as the third circuit rules on the emergency motion for stay." Order of May 20, 1988. This panel has by a separate order denied that emergency motion.

Second, on April 6, 1988 the petitioners moved in this court for further relief. The effect of the April 13 OMB change of position, allowing the bulk of the hazard communication standard to go into effect, is that the petitioners' charge of non-compliance is now narrowed to the three provisions which OSHA has in effect withdrawn, in compliance with the OMB disapproval.

Both Associated General Contractors of America, and United Technologies Corporation moved in this court to intervene for the purpose of opposing the petitioners' motion for further relief.

II

In this matter of first impression we are called upon to consider the extent to which the Paperwork Reduction Act of 1980 authorizes the OMB to substitute its judgment for that of OSHA with respect to the appropriate communication of hazards in the workplace necessary for compliance with section 6 of the OSH Act. Housed in Chapter 35 of Title 44 of the United States Code, which deals generally with "Public Printing and Documents," the Paperwork Reduction Act is the successor to the Federal Reports Act of 1942, previously codified in that Chapter. To generalize, the purpose of the Federal Reports Act was to coordinate the information collection activities of federal agencies, thereby reducing the cost of those activities to the government and to businesses

and individuals required to file reports. The Paperwork Reduction Act of 1980 moved that function from the Director of the Bureau of the Budget to a new Office of Information and Regulatory Affairs in the Office of Management and Budget.

The Paperwork Reduction Act authorizes OMB to:

> (1) review[] and approv[e] information collection requests proposed by agencies; (2) determin[e] whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency; . . .

44 U.S.C. § 3504(c)(1) and (2). The "information collection requests" referred to in section 3504(c)(1) are defined in section 3502(11) as "written report form[s], application form[s], schedule[s], questionnaire[s], reporting or recordkeeping requirement[s], collection of information requirement[s], or similar method[s] calling for the collection of information." The "collection of information" referred to in section 3504(c)(2) is defined in section 3502(4) as:

> the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either—
>
> (A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
>
> (B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; . . .

44 U.S.C. § 3502(4)(A) and (B). Assuming that the information in issue falls within the Paperwork Reduction Act of 1980, OMB's regulatory authority over it is specifically limited by two provisions of that Act. First, OMB's authority "shall be exercised consistent with applicable law." 44 U.S.C. § 3504(a). Second, the Act provides:

> Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any federal agency to enforce the civil rights laws.

44 U.S.C. § 3518(e). Thus any rulemaking activity by any other federal agency falls outside the authority of OMB under the Paperwork Reduction Act of 1980 if it either, (1) does not require the "collection of information," or (2) embodies substantive policy decision making entrusted to the other agency. We hold that the three provisions in the hazard communication standard which OMB disapproved are insulated from OMB authority on both grounds.

As we noted above, OMB disapproved of three provisions of the revised hazard communication standard, each of which was a departure from the standard which OSHA first imposed on employers in the manufacturing sector. Two of those departures are *exemptions* from the labeling requirements of the hazard communications standard. Thus, the revised standard exempts from its coverage (1) consumer products subject to labeling requirements under the Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.*, and the Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.*, and (2) drugs

subject to the labeling requirements of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* 29 C.F.R. § 1010.1200(b) (6) (vii) and (viii).

Whatever else the terms "collection of information" or "information collection requests" may refer to, they cannot possibly refer to these exemptions from labeling requirements which would otherwise have been duplicative of the labeling requirements imposed in the interest of health and safety by other federal regulatory agencies. What is left for consideration is the requirement that employers on multi-employer worksites exchange MSDSs, imposed for the first time in the August 24, 1987 promulgation. 29 C.F.R. § 1910.1200(e) (2). We note initially that we are not presented with the question whether the Paperwork Reduction Act of 1980 applies when the federal government requires from non-governmental parties, for its own purposes, compilation but not transmission of information. See *Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen*, 846 F.2d 1449 (D.C. Cir.1988). The multi-employer MSDS exchange provision requires employers, not to compile, but simply to transmit information to covered employees. The sole question it presents is whether that requirement can be said to involve either the "collection of information" or an "information collection request" within the meaning of the Paperwork Reduction Act.

In USWA I we discussed in detail the development by OSHA of the hazard communication standard. We noted that it imposed on chemical manufacturers the obligation to label containers and to furnish to downstream users MSDSs containing chemical common names of each hazardous ingredient, and information necessary for safe use of the product. 763 F.2d at 732. Although the issue was not raised in USWA I, implicit in OSHA's standard, and in this court's approval of it, is the holding that imposing this obligation on chemical manufacturers is an appropriate safeguard for workers in the workplace, as

required by section 6 of the OSH Act. The same must be said for the obligation imposed on downstream employers to make MSDSs available to their employees. *Id.* at 733. In one sense the standard requires chemical manufacturers to collect and transmit information, and employers to collect and maintain information. It would be a far-fetched interpretation of the Paperwork Reduction Act of 1980, however, to hold that these activities fell within its coverage. The Act, historically, is a successor to the Federal Reports Act, and like the latter, it is aimed at reducing the burden of paperwork required by the federal government for its own regulatory or statistical purposes. The preparation and preservation of MSDSs in the workplace have entirely different purposes. The object of these information disclosure requirements, in accordance with the OSH Act is to increase workplace awareness of hazards, thereby enabling workers to avoid injury, illness or death. Nothing in the Paperwork Reduction Act suggests a congressional intention to allow OMB, in the guise of regulating collection of information, the authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies.

OMB did not go so far as to disapprove the requirement that chemical manufacturers prepare and transmit MSDSs or the requirement that employers who purchase the chemicals make them available to their employees. It merely disapproved the requirement that on multi-employer worksites the employers exchange the MSDSs. In USWA I we questioned the basis of the Secretary's failure to include the construction industry in the hazard communication standard. 763 F.2d at 738. That industry is now included, and the problem of multi-employer worksites is endemic to it. OSHA reasonably concluded that the protection of one trade from hazardous substances used by another on the same jobsite required the

exchange of the hazard information. The exchange requirement no more constitutes the collection of information within the meaning of the Paperwork Reduction Act of 1980 than do the requirements for preparation of MSDSs by chemical manufacturers or the requirement of preservation of MSDSs by single employers.

Our conclusion that the regulations disapproved by OMB do not involve the collection of information is reinforced by the statutory language which in two places disaffirms the intention to grant substantive lawmaking authority to OMB. 44 U.S.C. §§ 3504(a); 3518(e). Clearly, OMB cannot in the guise of reducing paperwork substitute its judgment for that of the agency having substantive rulemaking responsibility for such matters as drug or food labeling, drug package inserts, proxy statement disclosures, or the contents of registration statements. No substantive distinction between such disclosure requirements and the OSHA disclosure requirements disapproved by OMB in this instance is readily apparent.

III

OSHA and United Technologies, as intervenor, contend that we should nevertheless deny the petitioners' motion for additional relief. They contends that the petition should be construed as a challenge to OMB agency action under the Paperwork Reduction Act of 1980, cognizable only in a suits in a federal district court pursuant to the Administrative Procedure Act. 5 U.S.C. § 703. Alternatively they contend that because the three provisions which OMB disapproved were added to the hazard communication standard they do not involve our prior mandate, and can only be reviewed in a new challenge to OSHA rulemaking. We reject both contentions.

In USWA I we directed OSHA to reconsider the application of the hazard communication standard to employ-

ees in sectors of the economy other than manufacturing unless the Secretary could state reasons why such application would not be feasible. 763 F.2d at 739 (citing 29 U.S.C. § 655(b)(5)). In USWA I we made it clear that our first judgment required that feasibility be determined for each category of worker on the basis of the administrative record already compiled. 819 F.2d at 1270. Thus, our prior orders represent our considered view that OSHA must cease abdicating its responsibility with respect to employees outside the manufacturing sector, by deciding whether or not they should be covered on the basis of the record. The August 24, 1987 promulgation of a hazard communication standard applicable to all employees was a good faith compliance with those orders. The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed. *Cf. Action Alliance*, at 1455 (new round of rulemaking not required for a revision that is the "logical outgrowth" of the rulemaking record). Withdrawal of the provisions disapproved by OMB was accordingly inconsistent with those orders. Relief by motion in inappropriate. 28 U.S.C. § 1651(a) (1982); 5 U.S.C. § 706(1) (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977); *USWA II*, 819 F.2d at 1270.

IV

This panel has denied the motion by Associated Builders & Contractors, Inc. for a stay of the hazard communication standard. That motion was made in connection with a petition for review filed in the Court of Appeals for the District of Columbia, and transferred here. This petition appears to be an attempt to relitigate issues settled in our decisions in *USWA I* and *USWA II*. Since, however, briefing on that petition has not been completed we will not rule finally on it at this time. The clerk will be directed to issue a briefing schedule, and, when brief-

ing is complete, to assign the petition to a panel for disposition.

V

The Secretary shall forthwith publish in the Federal Register a notice that those parts of the August 24, 1987 hazard communication standard which were disapproved by OMB are now effective. Because the instant dispute arose as the result of another federal agency's attempt to exceed its statutory authority, we will deny at this time the petitioners' motion to hold the respondent officials of the Department of Labor in contempt.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-3554, 83-3562 & 83-3565
84-3066, 84-3093 & 84-3128

UNITED STEELWORKERS OF AMERICA,
Petitioner

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, ETC.,
Respondent

PUBLIC CITIZEN, INC., *et al.*,
Respondent

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, ETC.,
Petitioner

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*, FISHER and KELLY, *District Judges* *

The petition for rehearing filed by the respondent in the above entitled case having been submitted to the judges who participated in the decision of this court and

* As to panel rehearing only.

to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

/s/ John J. Gibbons
Chief Judge

Dated: November 28, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-3554, 83-3562 & 83-3565
84-3066, 84-3093 & 84-3128

UNITED STEELWORKERS OF AMERICA,
Petitioner

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, ETC.,
Respondent

PUBLIC CITIZEN, INC., *et al.*,
Petitioner

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, ETC.,
Respondent

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*, FISHER and KELLY, *District Judges.**

The petition for rehearing filed by the intervenor, United Technologies Corporation, in the above entitled case having been submitted to the judges who partici-

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* As to panel rehearing only.

pated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

/s/ John J. Gibbons
Chief Judge

Dated: November 28, 1988